APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5253

United States of America,

Appellee,

v.

Jeffrey R. MacDonald,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Franklin T. Dupree, Jr., Judge.

Argued: June 9, 1982 Decided: August 16, 1982

Before BRYAN, Senior Circuit Judge, MURNAGHAN and SPROUSE, Circuit Judges.

BRYAN, Senior Circuit Judge:

In United States v. MacDonald, ____U.S. ____ (1982), the Supreme Court reversed our holding[1] that

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[1]United States v. MacDonald, 632 F.2d 258 (4th Cir.), *rehearing denied by an equally divided Court*, 635 F.2d 1115 (1980).

appellant's Sixth Amendment right to a speedy trial was abridged by the Government's delay in obtaining the indictment. On remand, we now speak to MacDonald's remaining advancements of error. *See id.* at ____n.4. Since the Supreme Court's opinion scrupulously chronicles both the facts of record and the protracted history of the case, *see id.* at ____, we forego repetitious narration.

I. *Due Process*

Our first concern is the accused's grievance that the two-year interval between the termination of the military proceedings and the grand jury's convocation[2] amounted to a denial of constitutionally-guaranteed due process. Laggardness in prosecuting a criminal charge rightfully exposes the Government to censure. Still, not every delay is of Constitutional moment. Indeed, we conclude that the instant hiatus, although objectionable, falls short of Constitutional injury.

To maintain this challenge, MacDonald must initially identify prejudice ascribable to the two-year gap. While a Sixth Amendment violation is made out merely by showing the potential for prejudice, here, under the Fifth Amendment, one must demonstrate actual prejudice. *United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Marion*, 404 U.S. 307, 325 (1971). We need not explore MacDonald's claims of actual prejudice, however, unless we also are assured that the delay "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and

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[2]It is now firmly established that only this period is subjected to the accusation of dilatoriness. *See* ____U.S. at ____ n.12; 632 F.2d at 263 n.2, 268.

which define the community's sense of fair play and decency." 431 U.S. at 790 (citations omitted).

In this regard, we write mindful of Supreme Court guidance peculiarly applicable here. While it did not decide this question, six Justices commented on the nature of and reasons for the delay in indicting MacDonald. For the Court, Chief Justice Burger concluded:

> Plainly the indictment of an accused — perhaps even more so for the indictment of a physician — for the heinous and brutal murder of his pregnant wife and two small children is not a matter to be hastily arrived at either by the prosecution authorities or by a grand jury. The devastating consequences to an accused person from the very fact of such an indictment is a matter which responsible prosecutors must weigh carefully. The care obviously given the matter by the Justice Department is certainly not any indication of bad faith or deliberate delay.

____U.S. at ____n.12. *See also id.* at ____(Stevens, J., concurring). We think this conclusive of the *Lovasco* test and fatal to the appellant's Fifth Amendment argument.[3]

II. *Psychiatric Character Testimony*

MacDonald presses, too, that the trial court was at fault in rejecting tendered expert psychiatric character

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[3]MacDonald further avers that he was denied due process of law through pervasive prosecutorial and judicial misconduct from indictment to conviction. We reject this argument, adhering to our observation in 1980:

> [T]he case was a sensational, drawn-out one, both hotly contested and bristling with difficult issues. The district judge's handling of the heavy demands placed on him was admirable.

632 F.2d at 260.

testimony. *See* Fed. R. Evid. 404(a)(1). After presenting thirteen lay witnesses who vouched for his nonviolent nature, MacDonald sought to present as evidence the conclusions of Dr. Robert L. Sadoff, a forensic psychiatrist, who would opine that the defendant was possessed of "a personality configuration inconsistent with the outrageous and senseless murders of [his] family."[4] *See* Fed. R. Evid. 404(a)(1).

The trial judge, however, declined to permit the witness to testify, ruling

that irrespective of the admissibility of the proffered

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[4]The following written proffer was made:

That it is recognized and accepted by reputable specialists in the field of forensic psychiatry that certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain types of anti-social conduct, including the commission of homicides involving extreme brutality to one's own spouse and small children and other crimes of violence; and that, conversely, other personality/emotional configuations are identifiable which are inconsistent with such antisocial behavior.

That based on his psychiatric examination of the defendant, it is his opinion of the character of Dr. MacDonald that the defendant was and is a man who is not given to extraordinary violent outbursts of physical violence against his wife and children; that he was and is an emotionally normal, mentally stable man, neither evasive nor apparently untruthful about the significant events of his life, including the murders of his family, who did not possess the type of personality/emotional configuration that would be consistent with and/or manifests this type of murderous assault on his wife and small children. *See* 485 F. Supp. at 1094.

> evidence under Rules 404 and 405, F.R.E., the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury. . . .

485 F. Supp at 1096-97; *see* Fed. R. Evid. 403. MacDonald now challenges this decision.

At the outset, we must recall that the appraisal of the probative and prejudicial value of evidence under Rule 403 is entrusted to the sound discretion of the trial judge; absent extraordinary circumstances, the Courts of Appeal will not intervene in its resolution. *E.g., Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962) (exclusion of expert testimony to be sustained "unless manifestly erroneous"); *United States v. Masters*, 622 F.2d 83, 87-88 (4th Cir. 1980) (reversed only if decision is rendered "arbitrarily or irrationally"). The District Judge was keenly aware of the factors bearing on the wisdom of admitting Dr. Sadoff's testimony and painstakingly examined each. Militating against admissibility were the cumulative nature of this testimony,[5] and the certainty of fostering a "battle of the experts" over Dr. MacDonald's psychiatric composition.[6] The Court concluded that an

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[5]As noted already, thirteen lay witnesses, described by the District Court as "highly intelligent and articulate, professional business people," 485 F. Supp. at 1094, testified at length to Dr. MacDonald's good character.

[6]The Government was prepared to call a parade of experts who would give opinions antipodal to Dr. Sadoff's. Under these circumstances, when ostensibly well-qualified medical experts square off with sharply divergent views, it seems likely the jury will only be confused. *See* 2 J. Weinstein & M. Berger, Evidence ¶ 405[03], at 405-36 n.18 (1981), *quoting* Falknor & Steffen, *Evidence of Character: From the "Crucible of the Community" to the "Couch of the Psychiatrist,"* 102 U.Pa.L.Rev. 980, 994 (1954).

expansion of the inquiry into this uncertain area would more likely confuse, rather than assist, the jury. A fair reading of the record and the District Court's memorandum opinion belies any claim that this decision abused the discretion reposed in the trial court, and we refuse, as we must, the invitation to substitute our judgment for its.[7]

III. *Pajama Top Demonstration*

We next analyze appellant's contention that the trial court erred in allowing the Government to demonstrate the similarity between the pattern of puncture holes in his pajama top and the pattern of icepick wounds in his wife's chest. The top was found draped over Mrs. MacDonald's chest when the authorities first arrived at the crime scene;[8] it was soaked with the victim's blood

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[7]Appellant places much emphasis on the following portion of the Advisory Committee's note to Rule 405 of the Federal Rules of Evidence, *reprinted in* Federal Rules Pamphlet, Criminal at 171 (West 1981):

> If character is defined as the kind of person one is, then account must be taken of the varying ways of arriving at that estimate. These may range from the opi[illegible] of the employer who has found the man honest u[illegible]ion of the psychiatrist based upon examin[illegible]ing.

This statement, however, merely manifests that, in the opinion of the Advisory Committee, expert psychiatric testimony would be relevant evidence of one's personality. If the District Court determines that the prejudicial impact of such evidence exceeds its probative value, however, Rule 403 permits exclusion of that evidence, "[a]lthough relevant."

[8]When the police first arrived at the MacDonald home, the defendant was lying across his wife's body. To administer first aid, an officer rolled him off his wife and on to the floor.

and, among other breaks in the fabric,[9] contained 48 round punctures. MacDonald has insisted that the shirt was damaged when, after it was pulled over his head in a scuffle and became entangled about his hands, he used it to fend off blows from an icepick wielded by the same assailants he avers murdered his family. According to his version of the incident, he placed the nightshirt on his wife's chest when he regained consciousness and discovered her body.

Suspicious of this story, the prosecution theorized that he intentionally placed the pajama top on his wife's body to disguise the fact that her blood had stained it in his fatal attack on her. Consistent with this hypothesis and the defendant's alleged maiming of the bodies to give the appearance of a massacre, the Government postulated that he riddled his wife's body with an icepick after laying the shirt across her body. Laboratory experts were asked to fold the shirt in the same manner as it was found at the MacDonald home and to determine whether the pattern of holes in the shirt and in the body coincided. Acting on these directions, the investigators folded the right sleeve inside out[10] and, after some adjustment, aligned the 48 holes so that a pattern of 21 punctures emerged. The resulting array, 5 holes on the right side and 16 on the left, bore a striking resemblance to the pattern of icepick wounds suffered by Mrs. MacDonald.

This process, the defense argued, inevitably disturbed the positioning of the pajama top before the photographs of the scene were taken. Although some variation of the posture of the shirt may have been occasioned by this act, we think it unlikely that the most crucial aspect of the shirt's configuration — that is, the right sleeve being turned inside out — would be affected noticeably by this movement.

[9]The shirt contained a single cigarette burn, several slashing tears, and a rip extending down from the V-neck.

[10]*See* note 8 *supra*.

The defense contends that allowing the jury to view this exhibition was error, urging that the prejudicial impact of this demonstration far outweighed its probative value. *See* Fed. R. Evid. 403. Further, counsel poses the possibility that the shirt was moved before it was photographed at the crime scene, the potentially infinite ways to align the 48 holes into a pattern of 21, and a variety of plausible shortcomings in the methods employed by the Government investigators. Each of these points merits scrutiny, and each was advanced, without limitation, before the jury.

Our task, however, is not to decide this dispute. As with the District Court's refusal to admit expert psychiatric testimony on the issue of Dr. MacDonald's personality, our inquiry now is, baldly, only whether that Court abused its discretion by finding this demonstration more probative than prejudicial. *See* part II *supra*. We think the District Court's decision that this evidence was not unduly prejudicial was acceptable. *See, United States v. Baller,* 519 F.2d 463, 466 (4th Cir.), *cert. denied,* 423 U.S. 1019 (1975). We therefore do not think its ruling was an abuse of discretion.[11]

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[11]Although each determination of the admissibility of evidence under Rule 403 must be analyzed separately, we believe it instructive to note two pertinent distinctions between the psychiatric evidence that was excluded by the District Court and the nightshirt demonstration which was admitted. Perhaps most significant is that the demonstration of the pajama top was in no way repetitive of any earlier testimony or demonstration. Additionally, however, the District Court made the determination, well-supported by authority, that psychiatric characterizations of personality are the type of evidence that the Court in *Baller* said "an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury." Despite the error inherent in all scientific inquiry, we find no abuse of discretion in the decision that the examination of physical evidence is more reliable than the conclusions of a psychiatric examination of a person's character.

IV. *The Rock Report*

Next, MacDonald argues the District Court erred when it refused to allow into evidence the findings and conclusions of Colonel Warren V. Rock, the investigating officer designated by the Army in 1970 to determine whether probable cause existed to prosecute MacDonald.[12] Principally, MacDonald argues the report was admissible as a public record under Fed. R. Evid. 803(8)(C).

Under Article 32 of the Uniform Code of Military Justice, an accused has a right to a pre-court martial investigation. An impartial officer is charged with assembling the evidence, ascertaining what charges may be brought, whether the charges are true, and what disposition should be made of the accusations in the interest of justice and discipline. *See* 10 U.S.C. § 832(a) (1976). While this probe is purely advisory, the subject is furnished counsel with the right to cross-examine witnesses. The officer then must forward a report to the appropriate military authorities. *Id.* MacDonald contends that these attributes place the Rock report squarely within Rule 803(8)(C). Under this rule, public records, reports, or statements of factual findings, although hearsay, are admissible against the Government in a criminal case if "resulting from an investigation, made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." The Government attacks its admissibility, pressing first that it was not trustworthy because in the years after 1970, a more detailed and sophisticated examination of

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[12]*See* Uniform Code of Military Justice art. 32, 10 U.S.C. § 832 (1976).

physical and other proof was possible and second, that even if literally acceptable, the District Court had discretion, which it properly exercised, to exclude the proffer on grounds of irrelevance, prejudice, or confusion.

Although Rule 803(8)(C) apparently has never been construed in this context, we think it apparent that the Rock report met the facial standards of admissibility. It was a) a "public record," b) to be introduced against the Government in a criminal case, c) containing factual findings, d) made pursuant to an investigation mandated by law, e) containing, given the impartiality of the investigating officer, the availability of counsel, and the right to examine and cross-examine, adequate circumstantial assurances of trustworthiness. This conclusion only begins our inquiry however, because Rule 803 does not mandate admission, it only allows reception of qualifying evidence.

In *Cox v. Babcock E.* [*sic*] *Wilcox Co.*, 471 F.2d 13 (4th Cir. 1972), we indicated that the admission of evaluative public records was discretionary with the trial court. Citing the dissent from the denial of rehearing in *Smith v. Universal Services, Inc.*, 454 F.2d 154, 160 (Dyer, J., dissenting), we said that a trial judge's decision to reject an EEOC investigative report was unassailable. As *Smith* made clear, such reports at times suffer from an undue risk of prejudice. To the extent they contain credibility determinations, they tend to undermine the exclusive province of the jury.

Such reasoning upholds the presiding judge's disallowance of Colonel Rock's findings and conclusions. While the Court properly could have admitted the evidence, we do not question the ruling of declination. The ultimate query to the jury in this case was whether defendant committed the crimes charged. Nowhere has appellant shown that this report would have helped towards an answer to this question. Indeed, its admission would

have tended to perplex, in that it likely would have distracted the jury's attention from its task of ascertaining guilt or innocence to a second-guessing of the Government's conduct of the murder investigation. There is no question that MacDonald was free to call any witnesses who testified in the Article 32 investigation or, indeed, to use such testimony, as appropriate, at his trial. Under these circumstances, we think the District Court sensitively concluded that the Rock report should be excluded. Seeing no abuse of discretion, we reject this assignment of error.

V. *The Stoeckley Witnesses*

Finally, appellant lays fault to the District Court's exercise of discretion in excluding the testimony of seven witnesses, all of whom would have testified to various inculpatory comments or statements assertedly made by Helena Stoeckley. The exclusion of this evidence, charges MacDonald, was error in that it abridged appellant's Fifth Amendment right to call witnesses in his own defense, was admissible under Rule 804(b)(3) and, in any event, constituted proper impeachment of Stoeckley's own testimony. Reviewing the evidence in question, we analyze these contentions in turn.

A

Since the commission of the crimes in February 1970, MacDonald has maintained that he and his family all were victims of a bizarre cult attack. He claims that the perpetrators included three men and a woman wearing a floppy hat, having blond hair, and wearing boots. The woman, he says, was Helena Stoeckley.

At trial, Stoeckley testified that although her hair was brown in color, she owned a blond wig at the time of the crimes. She further said that she owned a floppy

hat and boots. Although her recollection of events on the evening of February 16 and during the early morning hours of February 17 was, at best, hazy, she recalls not wearing the blond wig. However, she admitted to burning the wig and discarding the boots two days later.

While Stoeckley offered this much evidence seeming to corroborate MacDonald's version of the killings, the remainder of her testimony either contradicted him or tended to undercut his narration of the events. For example, she testified that she had never seen MacDonald before trial, had never been in his Fayetteville apartment, and while she vaguely felt that she might have had some connection with the crimes, since she had no explanation of her whereabouts between midnight and 5:30 a.m., she insisted she was not present at their commission. In all, the evidence disclosed that Stoeckley's memory was exceedingly poor and that she was constantly under the influence of narcotic drugs.

Because of this faulty memory, appellant sought to introduce a series of inculpatory statements through other witnesses. In this proffer to the District Court, in the absence of the jury, it was shown that these witnesses would give evidence substantially as follows:

1) Robert A. Brisentine, an Army investigator assigned to the homicides, interviewed Stoeckley April 23 and 24, 1971, approximately 14 months after the crime. Stoeckley told him she was present during the murders, but did not think that she had taken part. She offered to divulge the participants and provide more details, but wanted immunity from prosecution. Subsequently, she said she had "said too much."

2) James Gaddis, an officer of the Nashville Police Department, revealed that Stoeckley had confessed her belief that she was involved in the crimes in the fall of

1970. She also said that she knew others who were involved.

3) P. E. Beasley, a former detective with the Fayetteville Police Department, explained that Stoeckley had been a reliable drug informant for several years prior to the murders. On the morning of February 18, 1970, a day after the fateful events, she told Beasley, in response to his accusation that she matched MacDonald's description of the female intruder, "[i]n my mind, it seems I saw this thing happen . . . I was heavy on mescaline." Beasley also said that he observed funeral wreaths in the yard of Stoeckley's home. He added that she had told him she was mourning the MacDonalds.

4) Jane Zillioux, a Nashville neighbor of Stoeckley throughout the fall of 1970, said that Stoeckley had confided to her that she could not return to Fayetteville because she was involved in murders there. She further confessed that the victims were a woman and two small children and that she had disposed of the clothes she had been wearing to sever her connection with the crimes.

5) Charles Underhill, another Nashville acquaintance, testified that Stoeckley told him "they killed her and the two children."

6) William Posey, a neighbor of Stoeckley in Fayetteville, testified that Stoeckley told him a few days after the slayings that she didn't kill anyone herself, but did hold a light while the crime was in progress. She also confided to him that she was spotted by a policeman leaving the house.

7) Wendy Rouder, one of MacDonald's lawyers, testified that two days after Stoeckley had testified she could not remember anything about the night of the crime, she told Rouder "I still think I could have been there that night." Stoeckley also feared she would not be able to live with the guilt if MacDonald were convicted.

Finally, she recalled standing by the couch in the MacDonald apartment holding a candle "only — you know — it wasn't dripping wax; it was dripping blood."

After all of these individuals had testified without the presence of the jury, the District Court excluded the evidence. It ruled the statements inadmissible hearsay because untrustworthy. In addition, the Court rejected MacDonald's attempt to use the statements as impeachment on the grounds that it was not impeachment, properly so called, and in any event, was excludible under Rule 403 as unduly confusing and prejudicial.

B

Relying on *Chambers v. Mississippi*, 410 U.S. 284 (1973), MacDonald complains that the exclusion of the testimony of these seven "Stoeckley witnesses" deprived him of due process. He also maintains that Fed. R. Evid. 804(b)(3) explicitly supplies an exception to the hearsay rule and authorized admission of the Stoeckley witnesses' testimony.

Chambers involved an appeal of a criminal conviction obtained after the refusal of the trial court to permit defendant to introduce the testimony of three witnesses who would have said that one Gable McDonald admitted to each witness that he was guilty of the murder charged to Chambers. The Mississippi courts excluded the testimony on the ground that it was hearsay and not admissible under any exception recognized in that State. Particularly, Mississippi did not recognize statements against one's penal interest as an exception to the general hearsay prohibition.

The Supreme Court reasoned that the enforcement of this hearsay rule denied Chambers' due process. In so concluding, it found sufficient indications of trustworthiness in the circumstances of McDonald's admis-

sions. For example, the evidence disclosed that each of the three witnesses was a close associate of McDonald and that McDonald had made the damaging remarks spontaneously. In addition, they were corroborated by other facts — a sworn (although subsequently repudiated) confession by McDonald, testimony of an eyewitness putting McDonald at the crime scene, proof that McDonald owned a gun similar to the weapon used, and evidence that he was seen with the gun just after the shooting — giving credence to the asserted veracity of the hearsay. Finally, the Court noted that McDonald was present and available for the prosecution to call to the stand if it so chose. In circumstances "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id.* at 302.

This ruling, in large measure, is codified for Federal Courts in Fed. R. Evid. 804(b)(3).[13]

It conditions admissiblity on the unavailability of

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[13]Two qualifications, however, should be made. First Rule 804(b)(3) conditions admissibility on the unavailability of the declarant. In contrast, the *Chambers* Court found that the declarant's availability strengthened its conclusion that the declarant's admissions were reliable. One could argue that *Chambers* applies only where the declarant is available and where he is unavailable, the sole basis of contesting admissibility is Rule 804(b)(3).

Rather than drawing this distinction, however, we hold that *Chambers* and Rule 804(b)(3) impose the same standard. In so declaring, however, we do not mean to constitutionalize this or any other Federal Rule of Evidence. *Chambers*, it must be recalled, is peculiar because it arose in a State Court. Where a case arises in Federal Court, our supervisory power usually allows us to avoid treating evidentiary matters as Constitutional issues.

the declarant, and provides that a statement of the declarant is admissible if

> at the time of its making [it was] so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Fed. R. Evid. 804(b)(3). Thus, as applied to criminal matters, three requisites must be met prior to reception of the hearsay testimony. First, the declarant must be unavailable. Second, from the perspective of the average, reasonable person, the statement must have been truly adverse to the declarant's penal interest, considering when it was made. *Cf. United States v. Evans*, 635 F.2d 1124 (4th Cir. 1980), *cert. denied*, 452 U.S. 943 (1981) (suggesting that statement is not against penal interest where declarant made statements which appeared to subject himself to criminal liability but which actually would constitute defense to more serious crime). Finally, corroborating circumstances must clearly establish the trustworthiness of the statement. *United States v. Satterfield*, 575 F.2d 687 (9th Cir.), *cert. denied*, 439 U.S. 840 (1978).

We have no difficulty in agreeing with appellant that declarant Stoeckley was unavailable[14] and that her

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[14]Stoeckley actually testified at length at the trial. As to the subject matter of these statements, however, she claimed a loss of memory. Rule 804(a)(3) specifically includes asserted loss of memory as within the definition of "unavailability."

statements, if true, clearly would be against her penal interest. The question remains, however, whether the "corroborating circumstances clearly indicate the trustworthiness of the statement[s]."

As corroborating circumstances, MacDonald adverts to the fact that Stoeckley owned and regularly wore boots, a blond wig and a floppy hat, thus permitting her to fit the description of the assailant described by defendant. In addition, defendant argues that Stoeckley had no motive to fabricate; that each admission was consistent with the others; that, for the most part, her declarations were spontaneous and to close associates; that at the time of their making, she was (and is) still subject to criminal liability, and in making these statements, she recognized this fact; that she cannot account for her whereabouts on the night of the crime; and that her mourning the deaths evinces a consciousness of guilt. The District Court, by contrast, concluded the declarations were untrustworthy because Stoeckley's pattern of remarks in admitting and denying complicity rendered her hopelessly unreliable, and because her pervasive involvement with narcotic drugs, and her admissions that she was under the virtually continual influence of the drugs when these statements were made further manifested unreliability.

As with other of these evidentiary objections, our role in reviewing decisions at *nisi prius* construing Rule 804(b)(3) is a limited one. We must uphold the trial court unless it has abused its discretion. *See United States v. Guillette*, 547 F.2d 743 (2d Cir. 1976). No such abuse is evident here.

It is to be recalled that Rule 804(b)(3) places upon the proponent of a statement against interest a formidable burden. The declaraton offered to exculpate the accused must be supported by corroborating circumstances that "*clearly* indicate the trustworthiness of the

statement" (emphasis added). *Cf.* Fed. R. Evid. 804(b)(5) (residual exception only requires "equivalent circumstantial guarantee of trustworthiness"). As the Advisory Committee's Notes on this provision instruct, the risk of fabrication in this setting is significant. Consequently, rather than permitting only the jury to decide what weight to give the evidence, the initial responsibility is vested in the District Court. It is admonished that "[t]he requirement of corroboration should be construed in a manner [so] as to effectuate its purpose of circumventing fabrication." *See* Advisory Committee's Notes to Rule 803, *reprinted in* Federal Rules Pamphlet, Criminal at 222 (West 1981).

At the bottom, the sticking point here, as recognized by the District Court, is the fundamental problem of trustworthiness. While MacDonald is able to point to a number of corroborating circumstances, he does not demonstrate, finally, what they make Stoeckley's alleged declaration trustworthy. Her apparent longstanding drug habits made her an inherently unreliable witness. Moreover, her vacillation about whether or not she remembered anything at all about the night of crime lends force to the view that everything she has said and done in this regard was a product of her drug addiction. Given the declarant's "pathetic" appearance, our conviction is that the District Court was not in error in adjudging that defendant failed to carry his burden under Rule 804(b)(3). Thus MacDonald's argued violation of the Due Process clause fails.

C

Failing to establish the truth of the proffered Stoeckley declarations, MacDonald endeavored to use this same testimony as impeachment of Stoeckley's own testimony. The trial judge rejected the attempt, but on alternative grounds. To begin with, he explained that the

testimony was unduly confusing and not proper as impeachment since its substance already had been ruled inadmissible for its truth. Second, the Court concluded that the evidence to be offered by the Stoeckley witnesses did not contradict Stoeckley's own sworn testimony. Rather, it merely tended to supplement her statements.

The Court, we believe, properly used Rule 403 to exclude such testimony. As we observed in *United States v. Morlang*, 531 F.2d 183 (4th Cir. 1975), there is significant danger of prejudice where evidence is adduced for impeachment purposes that could not be presented directly on the merits of the case. *Id.* at 190. Of course, as defendant rightly notes, Fed. R. Evid. 607 permits a party to impeach its own witness. Still, where as here, the jury is likely to be confounded by statements which Stoeckley repeatedly avowed under oath she did not remember making, the District Court properly can exclude them under Rule 403.

VI.

At end MacDonald asserts that the evidence, even when taken most favorably for the prosecution, does not justify the finding of guilt beyond a reasonable doubt. *See Glasser v. United States*, 315 U.S. 60 (1942). Our canvass of the record, however, gives ample warrant for the verdict. With no merit in any issue on this appeal, the judgment of conviction is affirmed.

Affirmed.

MURNAGHAN, Circuit Judge, concurring:

On the discretion of the district judge, the opinion of Judge Bryan rests. On the present state of the law as it applies to the particular case before us, I find myself, albeit not without substantial misgiving, obliged to concur.

Nevertheless, I perceive a useful purpose for future cases in addressing one troubling aspect. It is evident that a basis may be erected for finding the hearsay statements of Helena Stoeckley untrustworthy. Given the wide discretion vested in the trial judge, we should not fault Judge Dupree to the extent of reversing.[1] Nevertheless, in view of the issues involved, and the virtually unique aspects of the surrounding circumstances, had I been the trial judge, I would have exercised the wide discretion conferred on him to allow the testimony to come in. My preference derives from my belief that, if the jury may be trusted with ultimate resolution of the factual issues, it should not be denied the opportunity of obtaining a rounded picture, necessary for resolution of the large questions, by the withholding of collateral testimony consistent with and basic to the defendant's principal exculpatory contention. If such evidence was not persuasive, which is what the government essentially contends in saying that it was untrustworthy, the jury, with very great probability, would not have been mislead by it.

In deciding whether a statement against interest should be admitted under the exception to the hearsay rule, the court must determine whether the "corroborating circumstances clearly indicate the trustworthiness of the statement." F. R. Evid. 804(b)(3). The question is

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[1]*Cf. United States v. Poland*, 659 F.2d 884, 895 (9th Cir. 1981), *cert. denied*, ____*U.S.* ____, *102 S. Ct. 611 (1981)*.

whether the statement is believeable,[2] that is to say appears to have been clearly within the competence of the witness to observe, without a demonstrable intention or disposition to prevaricate. *See United States v. Atkins*, 558 F.2d 133, 135-136 (3d Cir. 1977), *cert. denied*, 434 U.S. 929 (1977). There the district judge had excluded an overheard acknowledgement of guilt by someone other than the defendant because the witness was a minor, who had not completed high school, was unemployed, and was on welfare. The allegedly overheard conversation occurred outside a bar on a crowded street corner and was deemed unreliable by the district judge. In reversing, the Third Circuit emphasized that immediately after the witness overheard the declarant confess murder she saw parts of a rifle or shotgun in his car trunk, promptly told the story to the victim's family and accompanied them to the police station.

Credibility can be established in various ways. Considerations include the circumstances surround the statements, *United States v. Atkins, supra*, and the absence of motivation on the part of the declarant to fabricate, *United States v. Thomas*, 571 F.2d 285, 290 (5th Cir. 1978) (". . . the possibility of fabrication which is the rationale of the corroboration requirement, is slight.

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[2]Note that the test is not whether the district judge is satisfied that the statement is actually true as to the fact it is adduced to prove. Responsibility for that determination rests with the jury, as fact finder, not with the judge. The rule is not intended to allow the trial judge to admit only that evidence which satisfies him or conforms to his views as to what the disposition of the case should be. *Cf.* 4 Weinstein's *Evidence* ¶ 804(b)(3)[03] and the pungent comments relative to a trial judge's assessment of trustworthiness of the witness, rather than of the declarant: "The corroboration requirement should not be used as a means of usurping the jury's function."

Weeks had no motive to falsify" he being a co-defendant who had pleaded not guilty). Another factor deserving recognition is that of the general societal frame of reference. The latter can provide increased support for the believability of statements such as the ones now at issue. The likelihood of the truth of a seemingly outrageous story grows when an appreciation of current events is applied to the known facts and circumstances of a given case.

The defense of a marauding, drug-crazed purposeless group of homicidal maniacs is one which, absent the events surrounding the behavior of Charles Manson and the excruciating horror of the indescribably base murder of Sharon Tate, would have been dismissed as so incredible as to merit no serious attention. All that changed with the advent of Manson. Thereafter the possibility of such an occurrence, while still macabre, was considerably enhanced. The evidence, in my humble judgment, tended to show an environment in the vicinity of the military base where MacDonald was stationed in which persons might indeed emulate Manson or independently behave in such a fashion. Helena Stoeckley was shown to be a person of no fixed regularity of life, roaming the streets nocturnally at or about the time of the crimes, dressing in a bizarre fashion, and capable of so short-circuiting her mental processes through an indiscriminate taking of drugs that (a) she could well accept her presence and, to some extent, her involvement in the MacDonald murders and (b) she could become so separated from reality that, on the fatal evening, she was ripe for persuasion to participate.

It should be emphasized that the condition on admissibility of corroborating circumstances indicating trustworthiness represents an accommodation between concern about third party confessions and their high potential for fabrication, on the one hand, and awareness

of the enhancement of reliability flowing from the exposure to punishment for crime for the confessing declarant, on the other. Notes of the Advisory Committee on the Proposed Federal Rules of Evidence. Rule 804(b) *Exception* (3): "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication." The reason prompting Congress to add the corroboration provision to F. R. Evid. 804(b)(3) derived from the "special dangers of a trumped-up confession by a professional criminal or some person wih a strong motive to lie." 4 Weinstein's *Evidence* ¶ 804(b)(3)[03], at 804-103.

The record in the case satisfies me that, among the possible motivations leading to the statements of Helena Stoeckley, fabrication was not a likely one. The matter of what constitutes corroborating circumstances which clearly indicate the trustworthiness of the statement was left for judicial (i.e. case-by-case) development. 11 Moore's Federal Practice § 804.06(3)[2], at VIII-281. "It is clear that the standard for corroboration must not be too high." *Id.* at VIII-283.

A factor of corroboration cited by Justice Holmes in his famous dissent in *Donnelly v. United States*, 228 U.S. 243, 277 (1913) was "that there be no connection between declarant and accused." 4 Weinstein's *Evidence* ¶ 804-104, n.6. MacDonald and Stoeckley were not in any way acquainted. Weinstein additionally has this to say:

> The court should only ask for sufficient corroboration to "clearly" permit a reasonable man to believe that the statement might have been made in good faith and that it could be true. If, for example, the proof is undisputed that the person confessing to a shooting could not have been at the scene of the crime because he was in prison, it will be excluded. But if there is evidence that he was near the scene and had some motive or background connecting him with the crime that should suffice.

Id. 804-104-05. *But cf. Lowery v. State of Maryland,* 401 F. Supp. 604, 607 (D. Md. 1975), *aff'd without published opinion,* 532 F.2d 750 (4th Cir. 1976), *cert. denied,* 429 U.S. 919 (1976).

For all those considerations, my view is that the testimony should have been admitted. But it would read out of the law the concept of trial court discretion were courts of appeals to label as "abuse of discretion" any action by a district court with which the appellate court disagrees. Accordingly, I do not regard it proper to dissent.

I conclude with the observation that the case provokes a strong uneasiness in me. The crimes were base and horrid, and whoever committed them richly deserves severe punishment. As Judge Bryan has pointed out, the evidence was sufficient to sustain the findings of guilt beyond a reasonable doubt. Still, the way in which a finding of guilt is reached is, in our enduring system of law, at least as important as the finding of guilt itself. I believe MacDonald would have had a fairer trial if the Stoeckley related testimony had been admitted. In the end, however, I am not prepared to find an abuse of discretion by the district court, and so concur.

APPENDIX B

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit
No. 79-5253

United States of America,

Appellee,

vs.

Jeffrey R. MacDonald,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II

Clerk

FILED
August 16, 1982
U.S. Court of Appeals
Fourth Circuit

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JEFFREY R. MACDONALD, DEFENDENT

[Filed Sept. 14, 1979]

ORDER

Convicted by a jury of three counts of murder and sentenced by the court to three consecutive life sentences the defendant, Jeffrey R. MacDonald, through his counsel moved in open court immediately following pronouncement of judgment to be permitted to remain on bail pending appeal. The motion was denied initially but without prejudice to defendant's right to reduce the motion to writing and support it with further authorities and argument. This has now been done and two informal hearings attended by counsel for defendant and the government have been held. The court's final decision not to allow bail pending appeal was announced on September 7, 1979, and the reasons supporting this conclusion will now be recorded.

Although the government did not seek the death penalty in this case, the statute under which it was prosecuted still provides for such penalty, and traditionally bail has not been allowed in capital cases. The Bail Reform Act of 1966, 18 U.S.C. §§ 3146,

et seq., however, provides for release on bail of persons convicted of a capital offense who have filed an appeal in accordance with the provisions of 18 U.S.C. § 3146 "unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community . . . or if it appears that an appeal is frivolous or taken for delay. . . ." 18 U.S.C. § 3148. While it is true that this defendant is a well established professional man (a doctor) and has never heretofore failed to meet all court appearances, the situation with which he is now confronted is, of course, far different from that which has heretofore obtained. As a highly skilled physician the defendant presumably would have no difficulty at all in finding employment in any one of the many countries in the world which do not have in effect extradition treaties with the United States, and the temptation to seek refuge in another country would certainly be great indeed in this case.

Even so, the court would be reluctant to keep this defendant imprisoned while awaiting appeal if the court were convinced of the possibility of serious, reversible error in defendant's trial. Defense counsel were therefore requested to set forth in their written motion for bail those assignments of error on which principal reliance would be placed in the appeal, and in their motion they have listed some sixteen or more allegations of error only a few of which the court has deemed worthy of comment.

The cornerstone of defendant's legal defense remains his claim that he was denied his constitutional right of a speedy trial in the case. Quite correctly he points to the fact that the initial ruling of this

court denying his motion to dismiss based on speedy trial grounds was reversed in a split decision by the Fourth Circuit almost four years ago. *United States* v. *MacDonald*, 531 F.2d 196 (4th Cir. 1976). But the Supreme Court held that the Fourth Circuit lacked jurisdiction to entertain MacDonald's speedy trial appeal, and the case was eventually remanded to this court for trial. 435 U.S. 850 (1978). After referring to the four factors to be weighed in determining whether an accused has been deprived of his constitutional right to a speedy trial as set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, whether defendant has asserted the right and prejudice to defendant from the delay) the Supreme Court stated that prejudice to the defendant from the delay was the most serious and went on to say:

> "Before trial, of course, an estimate of the degree to which delay has impaired an adequate defense tends to be speculative. The denial of a pre-trial motion to dismiss an indictment on speedy trial grounds does not indicate that a like motion made after trial—when prejudice can be better gauged—would also be denied. Hence, pre-trial denial of a speedy trial claim can never be considered a complete, formal and final rejection by the trial court of the defendant's contention; rather, the question at stake in the motion to dismiss necessarily 'remains open, unfinished (and) inconclusive' until the trial court has pronounced judgment." *Id.*, 435 U.S. 858-9.

In the light of the Supreme Court's decision this court summarily overruled defendant's renewed motion to dismiss on speedy trial grounds again interposed at the pre-trial conference held on July 14,

1979. At that time the defendant took the position, to which he apparently still strongly adheres, that since the Fourth Circuit has already expressed its opinion on the speedy trial issue notwithstanding its decision was overturned later on jurisdictional grounds, it is a foregone conclusion that the case will again be dismissed on these grounds when it reaches the Fourth Circuit on appeal. This court does not believe that this result necessarily follows, and it is noted in the inception that following the court's order of July 14, 1979 the defendant promptly petitioned the Fourth Circuit for a writ of mandamus asking that the indictment be dismissed on speedy trial grounds which petition the Fourth Circuit just as promptly rejected.

Accordingly, the case has been tried to a jury in this court in a trial lasting six and one-half weeks during all of which time this court has been alert to detect the existence of any of the four factors required to be considered under *Barker* v. *Wingo*, *supra*, in determining the speedy trial issue. The length of the delay between the time of the crimes and the return of the indictment, almost five years, is, of course, fixed and indisputable, and although the government's explanation for much of the delay is not without plausibility, the impression remains that the case could have been put before the grand jury at a much earlier date than it was. There is also some evidence that the defendant expressed the desire to have the case brought to a head one way or the other much earlier than the time the indictment was returned. The assertion of a right to a speedy trial, however, is normally understood to refer to a right to a trial by one who has been indicted and is subject to a trial rather than to a right to have the govern-

ment to accelerate its efforts to obtain an indictment. It will be remembered, of course, that the four-and-a-half-year delay which followed the indictment was attributable almost entirely to the pursuit by defendant of innumerable motions, appeals and attempted appeals, all of which were ultimately resolved against him.

Essentially, then, the question involved here is whether the defendant has been prejudiced by pre-indictment delay. As stated in *Barker*, this question must be considered in the light of the interests the speedy trial right was designed to protect: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired."

While the Fourth Circuit in its original consideration of the speedy trial issue seemed to equate the defendant's restriction to quarters during the time the case was under investigation by the Army authorities with "pretrial incarceration," Judge Craven in his dissenting opinion in that case pointed out that the conditions under which defendant was restricted were far from burdensome. He apparently was able to go to and from his meals, to play golf and to have a feminine companion to visit him in his quarters from time to time, amenities certainly not enjoyed by one incarcerated in a jail awaiting trial. He apparently continued to draw his full pay without having to work, a privilege which few, if any, persons incarcerated awaiting trial ever enjoy. This court cannot see that there has been any "oppressive pretrial incarceration" in this case.

The anxiety and concern, if any, of this defendant would involve his subjective feelings, and while it can

certainly be assumed that he would have much preferred to know that the matter had been finally put to rest, the evidence is that following his honorable discharge from the Army and a short return to his home in New York he moved to California where he promptly established himself in the practice of his profession and acquired a wide host of friends both professional and social. The record would not support a finding that this defendant has suffered great anxiety and concern by reason of the pre-indictment delay in this case.

The fears expressed by the Fourth Circuit in its 1976 decision that the defendant's ability to defend the case adequately might be seriously prejudiced by the pre-indictment delay have not been borne out in the record developed at trial. Almost incredibly, the only material witness on either side of the case shown to have died was a government witness, and not only were all of defendant's original witnesses shown to be available to testify, but he was also able to produce one or more witnesses who were not even known to the defendant until recent times and who gave testimony vital to the defense. In addition the defendant was able to have the benefit of the testimony of several highly competent expert witnesses who were not known to or available to him at the time of the Army hearing in 1970. Finally, by reason of the excellent record he has made in the practice of his profession in California in the last seven or eight years defendant was able to produce a most impressive array of character witnesses none of whom would have been available to him had he been brought to trial within a year or two after the crimes were committed.

Significantly, in none of his motions based on speedy trial grounds has the defendant alleged any

particular in which his defense has been prejudiced in the least by delay. Contrarily, this court is of opinion that the delay may very well have worked in defendant's favor in that juries are not known to look with favor on stale claims, and there was no way that the jury in this case could have known that approximately one-half of the delay here was attributable to actions taken by the defendant himself rather than the government. Be this as it may, the court finds that the defendant's ability to defend this case adequately was not prejudiced by any of the delay, pre-indictment or otherwise, and that his speedy trial claim should be denied.

Since the court's instructions to the jury were not objected to by either party at the trial and defendant has pointed to nothing in the instructions which might conceivably constitute plain error, it is assumed that defendant's principal claim of prejudicial error during the course of the trial will center around the court's alleged erroneous evidentiary rulings. The two principal exceptions taken were to the court's refusal to admit testimony of witnesses to statements made out of court by the defendant's witness, Helena Stoeckley, and its refusal to admit the testimony of a psychiatrist, one Dr. Sadoff. The bases of the court's rulings on these two questions were dictated into the record at trial, see Transcripts for August 20, 1979 (Stoeckley) and August 22, 1979 (Sadoff), but it was indicated at the time that the court might elaborate further on its rulings in writing as soon as time should permit. This will now be done.

The Stoeckley Witnesses. Helena Stoeckley, an acknowledged drug addict, was living in Fayetteville at the time of the murders in question in February, 1970, as a fairly well-known member of the drug

culture. Colonel Rock, who conducted the Article 32 proceedings for the Army in 1970, had recommended that Stoeckley be investigated as a possible suspect in the MacDonald murders. Apparently this was based on the fact that this drug-addicted girl had engaged in some rather bizarre behavior shortly after the murders and had been unable to account for her whereabouts for about four hours on the early morning of February 17, 1970, during which time the murders occurred. She reportedly made statements to the effect that she thought she might have been in the MacDonald home at the time of the crimes, and there was evidence to the effect that she obtained some funeral wreaths from a florist shop near her residence and wore black for a while as if she were in mourning for the murder victims. There was also evidence that she had a long blond wig and a "floppy" hat and boots which in some respects seemed similar to those allegedly worn by one of the intruders claimed by defendant MacDonald to have committed the murders of his wife and two young daughters.

Stoeckley was located during the course of the trial at a place in South Carolina near Greenville and because of her reluctance to come to court in obedience to a subpoena the court ordered her taken into custody and brought to Raleigh to testify on behalf of the defendant. Upon her arrival counsel for defendant asked for a short recess to interview Stoeckley, and this stretched into almost an entire day of conferences between defense counsel, Stoeckley and a number of witnesses to whom she had allegedly made statements of one kind or another over the nine and one-half years which have elapsed since the murders in which she would indicate some possibility of her own involvement in these crimes.

On the following day Stoeckley was put on the stand by defense counsel and questioned at considerable length about her knowledge of the MacDonald murders. The substance of her testimony was that she was not involved in the murders but that because of her drug-crazed condition she had at least come to wonder whether or not she was in fact involved, and she admitted to owning the clothing referred to above and the fact that she seemed to go into mourning following the murders. The court gained the unmistakable impression which it believes was shared by the jury that this pathetic figure was suffering from drug-induced mental distortion and that she could be of no help to either side in the case.

The defendant next took the voir dire testimony of a half dozen or more witnesses to whom Stoeckley had made statements relating to the MacDonald murders beginning with a Fayetteville detective who interviewed her within a few days after the murders and ending with witnesses including members of defense counsel's staff who interviewed Stoeckley on the day she arrived in Raleigh to testify.

Several of these witnesses talked to Stoeckley in Nashville, Tennessee where she was living in the fall of 1970 and the early part of 1971. When she would talk to these witnesses she would sometimes be "hysterical", "crying", and "blubbering". She would say things like "I don't know whether I did it or not." She told one witness that she remembered being at the MacDonald home, that she knew who did it but that she did not do it herself, that she remembered nothing about the evening, that MacDonald himself did the killings and that she was unable to describe anything inside the MacDonald apartment. She was under the influence of drugs at times when she talked

to this witness but at other times she was not under the influence of drugs. She was interviewed by a CID agent on April 23 and April 24 of 1974 and told him that she was convinced that she had participated in these crimes for three or four months but was now of the opinion that she was present but did not participate. She was under the influence of narcotics the first day she talked to the CID agent but was "better" on the next day when she retracted everything she had told the agent on the previous day. This agent was unable to develop any information from Stoeckley showing that she really had any knowledge of the crime, and all the possible leads she was able to furnish were checked out and it was verified that the persons named by her were not involved.

The Fayetteville detective, one Beasley, interviewed Stoeckley at her home in Fayetteville between 2:30 and 3:00 a.m. on the morning of February 18, which was the day following the murders, and she told him at that time "in my mind it seems that I saw this thing happen," but she stated further that she was under the influence of the drug mescaline at the time and that she then backed off and would say no more. This officer held Stoeckley and several of her male companions for about an hour that morning after requesting his headquarters to contact the CID and have them come and interview these people, but when the CID agents did not arrive in about an hour the detective released these people and has never seen them again. Curiously, this officer's notes of his interviews with Stoeckley and her companions were lost or misplaced, and he has never seen them again. If it is within the province of this court to pass on the trustworthiness of a witness who proposes to

testify as to statements of another witness allegedly qualifying as an exception to the hearsay rule, see *United States* v. *Satterfield*, 572 F.2d 687 at p. 69 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 128, this court would be contrary to hold Officer Beasley's testimony to be unreliable. It is simply incredible that any self-respecting, competent police officer who really thought he had a substantial lead toward solving these sensational murders would allow the suspects to go after waiting only an hour for the Army investigators to come when he had had no direct contact with them himself and that he would never again pursue the lead on his own.

Statements allegedly made by Stoeckley to her neighbor, one Posey, were of the same equivocal character as the statements sought to be proven by the other witnesses referred to above. For reasons which were brought out more fully by the government's cross-examination of this witness, if required to do so this court would find his testimony untrustworthy.

The defendant sought to introduce testimony of these out-of-court statements by Stoeckley as exceptions to the hearsay rule under Rule 804(b) of the Federal Rules of Evidence, contending that they qualified as statements against Stoeckley's penal interest in view of Stoeckley's "unavailability as a witness." In view of Stoeckley's testimony that she had no recollection of the subject matter of at least some of her statements, the court was prepared to rule that she qualified as an unavailable witness under Rule 804(a)(3), and although it is a debatable proposition, the court was willing to assume arguendo that the statements were against Stoeckley's penal interest. The trouble with the proffered testimony, however, lies in its failure to meet the test of the second sentence of Rule 804(b)(3) which reads as follows:

> "A statement tending to expose the declarant to criminal liability and offer to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

After studying the transcript of Stoeckley's own testimony and that of the proposed witnesses given on voir dire the court was convinced that far from being shown by corroborating circumstances to be clearly trustworthy, the alleged statements of Stoeckley were so clearly untrustworthy that the court should not hesitate to exercise its discretion to exclude the evidence under Rule 403, F.R.E., which provides:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

That the determination of admissibility under Rule 804(b)(3) is left to the discretion of the trial court is hardly open to question, *United States* v. *Guillette*, 547 F.2d 743 (2nd Cir. 1976); *United States* v. *Ropeza*, 564 F.2d 316, 325 (9th Cir. 1977), and the standard for appellate review is whether or not the discretion was abused. *United States* v. *Bagley*, 537 F.2d 162, 166-167 (5th Cir. 1976).

The closest case on the facts which the court was able to find was *United States* v. *Satterfield*, 572 F.2d 687 (9th Cir. 1978), *cert. denied*, 99 S.Ct. 128. In that case the witness took the Fifth Amendment and therefore made himself unavailable. In sustaining the trial court's ruling excluding testimony about an

alleged statement made out of court by the witness because clear circumstances corroborating the veracity of the witness were absent, the court listed some of the circumstances which tended to corroborate the trustworthiness of the statement and others which indicated that the statements were untrustworthy. The court said:

> "Under Rule 804(b)(3), the corroborating circumstances must do more than tend to indicate the trustworthiness of the statement; they must *clearly* indicate it. There is good reason to believe that [the witness] staged the argument with [the defendant's] help and that his alleged statements . . . were also fabricated. The trial court did not abuse its discretion in denying [defendant's] motion to admit this evidence." *Id.* p. 693.

In assessing the trustworthiness of statements of the kind sought to be introduced here the court must inquire into the reliability of and the necessity for the statement. *United States* v. *Carlson*, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914. Here the statements of Stoeckley were anything but reliable, and no necessity for her making the statements was ever shown. To the contrary, it appears that for the most part the statements were made by her voluntarily while she was under the influence of powerful narcotics.

The case relied upon by defendant, *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), is clearly distinguishable. In that case the hearsay statements of the declarant were originally made and subsequently offered at the trial under circumstances that provided assurance as to their trustworthiness. The statements

consisted of the confessions made spontaneously by the declarant to a close acquaintance shortly after the crime had occurred; the statements were corroborated by other evidence in the case including the declarant's sworn confession which he later repudiated, the testimony of an eye witness to the murder, the testimony that the declarant was seen with a gun immediately thereafter and proof that the declarant owned a weapon of the kind involved in the crime. Moreover, "[t]he sheer number of independent confessions provided additional corroboration for each" and "each confession here was in a very real sense self-incriminatory and unquestionably against interest." 410 U.S. 300-301. Nothing remotely resembling such corroborating circumstance is present in the case at bar.

As an alternative ground for the admission of the out-of-court statements of Stoeckley defendant argued that the statements were admissible for impeachment purposes under Rule 613, F.R.E. The court had the definite feeling that the real purpose of counsel in endeavoring to get the evidence in as impeachment was simply to get it before the jury, and if this is so the evidence was properly excluded under *United States* v. *Morlang*, 531 F.2d 183, 190 (4th Cir. 1975), where it was said:

> "The overwhelming weight of authority is . . . that impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible."

In that case it was recognized that the danger of confusion, even where the evidence is limited to impeachment, may be so great as to upset the balance

and warrant its exclusion. Authority for exclusion of such evidence is now contained in Rule 403, F.R.E.

The court chose to exclude the evidence on other grounds. To begin with, in order to impeach a witness by a prior statement there must in fact be testimony which is inconsistent with the prior statement. *Gilmour v. Strescon Industries, Inc.*, 66 F.R.D. 146 (E.D.Pa. 1975), *aff'd*, 521 F. 1398 (3rd Cir. 1975).

> "Any statement is inconsistent if under any rational theory it might lead to any relevant conclusion different from any other relevant conclusion resulting from anything the witness has said." 3 Weinstein's Evidence, 613-11.

The alleged statements made by Stoeckley are in some instances at variance with her sworn testimony given at the trial in this case, but by the same token the statements in some respects are entirely consistent with testimony given at the trial by Stoeckley. And so we were simply left with conflicting statements made by Stoeckley to the same witness, and to have allowed such statements to be admitted could only have added to the confusion already engendered by her own vague and totally untrustworthy testimony which she had given from the witness stand.

The Psychiatric Testimony. The defendant proffered the testimony of a forensic psychiatrist, Dr. Robert L. Sadoff, who apparently proposed to give testimony as follows:

> "That it is recognized and accepted by reputable specialists in the field of forensic psychiatry that certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain

types of anti-social conduct, including the commission of homicides involving extreme brutality to one's own spouse and small children and other crimes of violence; and that, conversely, other personality/emotional configurations are identifiable which are inconsistent with such anti-social behavior.

"That based on his psychiatric examination of the defendant, it is his opinion of the character of Dr. MacDonald that the defendant was and is a man who is not given to extraordinary violent outbursts of physical violence against his wife and children; that he was and is an emotionally normal, mentally stable man, neither evasive nor apparently untruthful about the significant events of his life, including the murders of his family, who did not possess the type of personality/emotional configuration that would be consistent with and/or manifests this type of murderous assault on his wife and small children."

This evidence was sought to be introduced under Rule 404(a)(1) of the Federal Rules of Evidence which declares admissible evidence of a pertinent trait of the character of an accused for the purpose of proving that he acted in conformity therewith on a particular occasion. Defendant contended that the proffered psychiatric testimony would show that the defendant "was a well-adjusted man, without violent tendencies" and would "establish a personality configuration inconsistent with the outrageous and senseless murders of defendant's family."

Numerous lay witnesses most of whom were highly intelligent and articulate professional and business people, had already testified to the defendant's character traits of peacefulness, non-violence, rationality

and compassion for his fellow man, but it was the position of the defendant that the opinion of a qualified psychiatrist based on his examination of the defendant might well be more reliable evidence of character than that of even the most perceptive lay observer. Defendant points to a note by the Advisory Committee to Rule 405, F.R.E., which he contends expressly sanctions the introduction of such psychiatric opinion testimony. The note reads in pertinent part as follows:

> "If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion."

In ruling on the admissibility of this proffered expert testimony the court indicated that it would allow testimony by Dr. Sadoff as to the defendant's character traits such as peacefulness and non-violence which would be inconsistent with the commission of the crimes in question, but that it had been concluded following a study of the pertinent authorities that the proffered testimony to the effect that "certain personality/emotional configurations are identifiable in human beings which, because of the mental disorders involved, are indicative of a capability or disposition to certain types of anti-social conduct including the commission of crimes of the type here involved" should not be admitted. Several reasons led the court to this conclusion.

The legal principles applicable have been stated in *United States* v. *Amaral*, 488 F.2d 1148 (9th Cir. 1973), as follows:

> "The basic purpose of any proffered evidence is to facilitate the acquisition of knowledge by the triers of fact thus enabling them to reach a final determination. As often stated, our system of evidence rests on two axioms: Only facts having rational probative value are admissible and all facts having rational probative value are admissible unless some specific policy forbids. . . . Evidence which has any tendency in reason to prove any material fact has rational probative value.
>
> "The general test regarding the admissibility of expert testimony is whether the jury can receive 'appreciable help' from such testimony. . . . The balance of the probative value of the tendered expert testimony evidence against its prejudicial effect is committed to the 'broad discretion' of the trial judge and his action will not be disturbed unless manifestly erroneous. . . .
>
> "The countervailing considerations most often noted to exclude what is relevant and material evidence are the risk that admission will (1) require undue consumption of time, (2) create a substantial danger of undue prejudice or of confusing the issues or of misleading the jury, (3) or unfairly and harmfully surprise a party who has not had a reasonable opportunity to anticipate the evidence submitted. Scientific or expert testimony particularly courts the second danger because of its aura of special reliability and trustworthiness.

> "Because of the peculiar risks of expert testimony, courts have imposed an additional test, i.e., that the testimony be in accordance with a generally accepted explanatory theory." *Id.*, p. 1152.

The court assumed that Dr. Sadoff could qualify as an expert in in forensic psychiatry, but proof that his proffered testimony would conform to a generally accepted explanatory theory was lacking. In his brief the defendant cited several articles in psychiatric journals which were said to deal with this subject, but the articles were not made available to the court, and with the possible exception of the case of *United States* v. *Staggs*, 553 F.2d 1073 (7th Cir. 1977), the court was not cited any case decided under the Federal Rules of Evidence supporting the admissibility of psychiatric testimony of the type sought to be introduced here. The government, on the other hand, has cited an article by an Assistant Professor of Psychiatry at UCLA entitled "A Critique of the Psychiatrist's Role as Expert Witness," 12 Journal for Science 172 (1967), from which the following quote is taken:

> "It is not possible, nor is it likely in the near future, for a psychiatrist who first sees the patient some time, often months, after the offense, to give specific information about the mental state of the defendant at the time of the offense. However, the moment that the psychiatrist is pressed to give his opinion, which is no more than his personal guess or moral conviction, there suddenly appears something interpreted as tangible and scientific. Under the guise of science, part or all of the responsibility for the difficult issue of criminal responsibility is thus handed over to the psychiatrist."

Evidence is not necessarily admissible simply because the witness purports to base his testimony on an ostensibly scientific principle. The principle must be sufficiently established to have gained general acceptance in the particular field to which it belongs. *United States* v. *Brown*, 557 F.2d 541, 556 (6th Cir. 1977). Moreover, the opinion of an expert because of its seeming objectivity is apt to carry undue weight, so not every ostensibly scientific technique should be recognized as the basis of expert testimony. *United States* v. *Baller*, 519 F.2d 463, 466 (4th Cir. 1975).

> "In order to prevent deception or mistake and to allow the possibility of effective response, there must be a demonstrable, objective procedure for reaching the opinion and qualified persons who can either duplicate the result or criticize the means by which it was reached, drawing their own conclusions from the underlying facts." *Id.*, p. 466.

In *United States* v. *Brown*, *supra*, the court rejected the government's proffered expert testimony demonstrating that ion microprobic analysis of human hair had reached a level of general acceptance in the field to make it a sufficiently reliable and accurate means for expert identification of hair. The court said:

> "While it is a truism that every useful new development must have its first day in court. . ., expert testimony on a critical fact relating to guilt or innocence is not admissible unless the principle upon which it is based has attained general acceptance in the scientific community and it not mere speculation or conjecture." *Id.*, pp. 558-9.

Our case here was further complicated by the fact that the government's own forensic psychiatrist had examined the defendant and had reached conclusions diametrically opposed to those of Dr. Sadoff. The report of this expert which has been furnished counsel for defendant and to the court for its in camera review tends to indicate that the defendant does indeed possess those traits of character which are consistent with his commission of the crimes with which he is charged and that he possesses other traits which tend to cast serious doubt on the credibility of his explanation of how the crimes occurred.

The result was that we had shaping up a "battle of the experts" referred to by Weinstein in his work on *Evidence*, Section 405[03], 405-34, where he quotes from an article by Falknor and Steffen entitled "Evidence of Character: From the 'Crucible of the Community' to the 'Couch of the Psychiatrist' ", 102 Univ. of Pa. L.Rev. 980, 994 (1954) as follows:

> "Even in the case of strictly medical testimony, where the issue concerns physical rather than mental or psychological condition or disability—'objective' rather than 'subjective' symptoms—experience has demonstrated the commonness of disagreement among the 'experts.' When the inquiry is centered on an intangible, impalpable, wholly subjective thing like state of mind, personality or 'propensity,' the likelihood of disagreement is greatly enhanced. Thus there is point to the conclusion of the New Mexico court to the effect that it was 'unwilling to enlarge the already immense field where medical experts, apparently equally qualified, express such diametrically opposite views on the same facts and conditions,' to the 'bewilderment of the fact finder.' "

In view of all of these considerations the court concluded that irrespective of the admissibility of the proffered evidence under Rules 404 and 405, F.R.E., the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury and that it should be excluded under Rule 403. See further Wright & Graham, *Federal Practice & Procedure*, § 5265.

The defendant's proposed assignment of error based on the denial of defendant's motion for judgment of acquittal made at the close of the government's evidence (but not renewed, as the court recalls, at the close of all the evidence) is considered to be without merit. Although the introduction of evidence by the parties extended over the better part of six weeks and encompassed much highly technical and scientific evidence on each side, the one central question involved in the case from the beginning to the end was whether the jury would believe the defendant's story that the murders had been committed by four intruders who entered his home through an unlocked back door in the early morning hours of February 17, 1970. Selection of this jury extended over a period of three days, and while in the court's view the parties were entitled to only ten challenges each, at their insistence they were allowed twenty challenges each as provided in capital cases involving the death penalty. The result was the selection of a jury panel composed of intelligent, conscientious citizens from almost every walk of life who were obviously imbued with a serious sense of responsibility and who gave the case their undivided attention throughout the unusually long trial. Counsel for both sides agreed that it was a good jury. and the six and one-half

hours of deliberations which they required to reach a verdict demonstrates that their task was not taken lightly. This jury obviously declined to accept Dr. MacDonald's story, and the result was the return of the guilty verdict. The court remains of opinion that the verdict was fully supported by the evidence and that the denial of the motion for judgment of acquittal was proper.

The court has considered the twelve additional proposed assignments of error relating principally to evidentiary rulings, and it would serve no useful purpose to examine these seriatim at this time. Suffice it to say that in those instances where objections were properly lodged and an explanation for the court's ruling was considered appropriate, the same will appear in the transcripts of the trial and the pre-trial proceedings. The court remains of opinion that these rulings were proper.

The court is fully cognizant of the fact, of course, that it is not its province to sit in appellate review of itself, and the elaboration herein on what it understands to be defendant's principal proposed assignments of error is intended only to comply with the court's intention expressed at trial to explicate some of its rulings more fully as soon as time should permit and to state additional reasons as to why the court has concluded not to allow bail pending appeal.

In summary, the court remains of opinion that no one or more conditions of release will reasonably insure that the defendant will not flee and that while defendant's appeal is certainly not frivolous, he has failed to demonstrate to this court that it has sufficient legal merit to create in the court a genuine concern that defendant will have wrongfully been held in custody pending his appeal. His motion for bail

must therefore be and is hereby denied.

SO ORDERED as of September 7, 1979.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
United States District Judge

Appendix D

Excerpt from Brief For Respondent in No. 80-1582, pp. 3-5:

Dr. MacDonald, the only witness to testify to the circumstances of the attack, gave the following account. (*See* Tr. 6560-6615)

He spent the evening of February 16th at home with his two children while Colette attended an evening class at a local college. He put the two children to bed, Kristen at about 7:15, Kimberly at about 9:00. Colette returned home at about 9:40 and retired at about midnight. Dr. MacDonald watched television in the living room until about 1:00 a.m. When he went to the master bedroom, he found that Kirsten had gotten into bed with her mother. He carried Kristen to her own room and then discovered, upon returning to the master bedroom, that she had wet his side of the bed. He thereupon secured an afghan and went to the living room to sleep on the couch.

His next recollection, after falling asleep, was that he heard Colette screaming. As he started to rise, he saw several people at the foot of the couch. He made out that there were four persons in the room — one black male, two white males and one white female. He was promptly attacked, and he struggled with his assailants. He heard the woman say, "Acid is groovy; kill the pigs." During the struggle his hands became bound up in his pajama top. At some point in the brief affray, he felt a sharp pain in his right chest. Also, he fleetingly observed that the woman had blond hair, that she was wearing a white floppy hat and boots, and that there was a flickering light on her face as if she were holding a candle.

The next thing he remembers, he was lying on the floor and the house was quiet. He got up and went to the master bedroom. Colette was on the floor. Blood was profuse. He removed the pajama top, which was still on his

wrists, and pulled a knife from Colette's chest. He attempted mouth-to-mouth resuscitation, but found that air was coming from the wounds in her chest. He checked Colette's pulse but could detect no sign of life.

Dr. MacDonald then went, in turn, to the children's rooms. They, too, were covered with blood and proved unresponsive to attempts at resuscitation.

Although the exact sequence of events has never been clear to him, at some point he went into the bathroom. He returned to Colette. He may have again attempted artificial respiration. At another point, he reached for his pajama top and placed it in on Colette's chest and placed some other item on her as well. He does not know why he tried to cover her, only that he did.

He picked up the phone in the master bedroom and dialed the operator to call for help. When the operator insisted on knowing whether he was calling from on-Post or off-Post, he dropped the phone. Noticing that the back door (which opens off a utility room next to the master bedroom) was ajar, he went to that door. He looked out, did not see anything or anyone, and returned to check once again his wife and children.

The next thing he recalls is being on the phone in the kitchen. He picked up the phone, and, without having dialed, heard a female voice ask if he was Captain MacDonald. He said he was, that people had been stabbed and were dying, and that help was needed. Then a sergeant came on the phone and Dr. MacDonald again said that people were dying. The next thing he knew, there were people standing over him. He was lying next to Colette in the master bedroom and a military policeman was giving him mouth-to-mouth resuscitation.

When he revived, Dr. MacDonald gave the military police the following description of the four intruders: one black male wearing an Army field jacket with ser-

geant stripes on the sleeve, two white males, and a blond female wearing a floppy hat, boots and a short skirt, and possibly carrying a candle (Tr. 1503-1505).